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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 242

MORRIS W. MAMLIN AND RALPH E. WELKER,
Petitioners,

vs.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

KESTER WALTON,
WILLIAM J. COCKE,
Counsel for Petitioners.

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SUPREME COURT OF THE UNITED STATES

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No. 242

THE UNITED STATES

Petitioners,

vs.

MORRIS W. MAMLIN AND RALPH E. WELKER,

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

To the Honorable the Chief Justices and Associate Justices of the Supreme Court of the United States:

Summary of Statement of Matters Involved

This action involves the construction of Section 10(i) of the Air Corps Act of July 2, 1926 (10 U. S. C. 310; U. S. C. A. Title 10, Section 310).

The petitioners filed their petition in the Court of Claims to recover of the United States their reasonable and entire compensation for the use by the United States of a design

which they allege in their petition filed in that court relates to aircraft, which was used and manufactured by the Government without just compensation being paid to them either by the Government or any other source. The petitioners further allege in their petition that commencing on or about the 28th day of April, 1944 and continuously since said date their design relating to aircraft, to wit; their design of a safety appliance originated and developed and designed by them for fighting fires on aircraft or at aircraft crashes at air bases or landing fields, on aircraft carriers of the Armed Forces of the United States, had been used by the United States without just compensation being paid them.

The design which is pictured in Exhibit A attached to the petition filed in the Court of Claims of the United States is a part of the record filed herewith (R. 5).

This design is a plastic shield and its attachments for the protection of the face of fire fighters at aircraft fires. The petitioners further allege in their petition that this design was "especially developed and is particularly adapted to protect fire fighters at fires involving aircraft" (R. 1). The petitioners further allege that this design is one "relating to aircraft" (R. 1).

Special value to the respondent, United States, is set out; an accounting is requested, and the petitioners allege on information and belief that the entire and reasonable compensation due them from the United States for the use and manufacture of their design is One Million ($1,000,000.00) Dollars, which amount they pray to recover, or such other or further sums which will compensate petitioners according to law.

They set out in their petition in the Court of Claims that the laws and statutes relied upon by them are as follows:

> United States Constitution Amendment 5: "Nor shall private property be taken for public use without just compensation";

United States Code Annotated, Title 10, Section 310, sub-section (i): "Use of designs without just compensation; right to sue Government; limitation. Any person, firm, or corporation that shall complain that his, their, or its designs hereafter developed relating to aircraft or any components thereof are used or manufactured by or for any department of the Government without just compensation from either the Government or any other source, may within four years from the date of such use file suit in the Court of Claims for the recovery of his reasonable and entire compensation for such use and manufacture after July 2, 1926." (July 2, 1926, c. 721, Sec. 10, 44 Stat. 784, as amended Mar. 3, 1927, c. 345, 44 Stat. 1380; Aug. 7, 1946, c. 770, Sec. 1 (17, 33), 69 Stat. 867."

The United States, respondent, filed its demurrer for the reason the petition does not set forth a cause of action against the United States, or a cause of action of which the Court of Claims has jurisdiction.

In a judgment and opinion entered June 1, 1948 the Court of Claims sustained the demurrer of the United States and dismissed the petition on the grounds that the design of the petitioners was not "one relating to aircraft" within the meaning of Section 10(i) set forth above.

This is a petition for a writ of certiorari to review the opinion and judgment of the Court of Claims.

Questions Presented

I

Did the Court of Claims err in considering in the construction of the Section 10(i) excerpts from statements made by various individuals before the President's Aircraft Board, popularly known as the Morrow Committee, set forth in the appendix, pages 14 through 25 of the brief of the United States supporting its demurrer?

II

Did the Court of Claims err in excluding the plaintiffs from relief under Section 10 (i) in deciding that "designs relating to aircraft" means "designs of an aircraft"?

Reasons Relied upon for the Allowance of the Writ

This case presents questions of the first importance relating to the construction of Section 10 (i) of the Air Corps Act of 1926. This section of the Act has not been construed by this Court and prior to June 1, 1948 it had not been passed upon by the Court of Claims. It is a remedial statute and a final and authoritative interpretation is necessary in order to set at rest its construction.

Richmond Screw Anchor Company v. *United States,* 275 U. S. 331; 72 L. Ed. 303.

Aside from the novelty and importance of the issues presented, the decision below should be reviewed for the additional reasons we submit that it is clearly erroneous and not in accord with the principles of applicable decisions of this Court.

To the extent that the decision below is based upon the testimony before the President's Aircraft Board, popularly known as the Morrow Committee, as set out in pages 13 through 25 of the appendix of the respondent's brief in support of its demurrer, it is not in accord with the decisions of this Court in the following cases, among others:

McCaughn v. *Hershey Chocolate Company,* 283 U. S. 488; 75 L. Ed. 1183;

Lapina v. Williams, 232 U.S. 78; 58 L. Ed. 515; Aff. 179 F. 839; 103 C. C. A. 327;

Arizona v. *California,* 292 U. S. 341; 78 L. Ed. 1298;

United States v. *Missouri Pac. Ry. Co.,* 278 U. S. 269, at p. 278; 73 L. Ed. 322.

The Court of Claims also erred in deciding that the phrase "designs relating to aircraft" means "a design of an aircraft", thus failing to give the broad definition to the term "relating to" that ordinary usage would imply and public policy would justify, contrary to the decisions of this court in the following cases, among others:

United States v. *Coombs,* 37 U. S. 72; 9 L. Ed. 1004;
De Ganay v. *Lederer,* 250 U. S. 376; 63 L. Ed. 1042;
Old Colony Ry. Co. v. *C. I. R.,* 284 U. S. 552; 76 L. Ed. 484;
U. S. v. *Temple,* 105 U. S. 97; 26 L. Ed. 967;
Addison v. Holly Hill Fruit Products, 322 U. S. 607; 88 L. Ed. 1488.

In the interest of brevity petitioners do not at this time set forth here all of their points which will be argued on the merits of this case should the writ of certiorari be granted, nor all of their contentions in support of these points, which are argued at length in the brief accompanying this petition and the petitioners here refer to their brief and incorporate in this petition all the matters presented therein.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Court of Claims commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein determined, a transcript of the record and the proceedings herein, and that the decree of the Court of Claims be reversed and your petitioners have such other and further relief in the premises as to this Honorable Court may seem meet and just.

KESTER WALTON,
WILLIAM J. COCKE,
Counsel for Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 242

MORRIS W. MAMLIN AND RALPH E. WELKER,
Petitioners,

vs.

THE UNITED STATES

BRIEF SUPPORTING PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

To the Honorable the Chief Justices and Associates Justices of the Supreme Court of the United States:

Statement of Grounds on Which the Jurisdiction of the Supreme Court Is Invoked

Jurisdiction for the Supreme Court to entertain the petition for certiorari filed by the petitioners is given in the following statute, being U. S. C. A. Title 28, Section 288-b:

> "(b) In any case in the Court of Claims, including those begun under section 287 of this title, it shall be competent for the Supreme Court, upon the petition of either party, whether Government or claimant, to re-

quire, by certiorari, that the cause be certified to it for review and determination of all errors assigned, with the same power and authority, and with like effect, as if the cause had been brought there by appeal."

(As amended May 22, 1939, c. 140, 53 Stat. 752.)

The petitioners pray that a writ of certiorari be granted to review judgment of the Court of Claims entered June 1, 1948, adverse to them, in which the Court sustained a demurrer of the United States to their cause of action.

Statement of Case

The petitioners alleged in their petition before that Court that the United States used their "design relating to aircraft" commencing on or about the 28th day of April, 1944, and continuously since that date; that their design is a safety appliance especially originated, developed and designed by them for fire fighters on aircraft, or at aircraft crashes at air bases or landing fields or on aircraft carriers of the Armed Forces of the United States. The petitioners' alleged design is a plastic shield and its attachments for the protection of the face of fire fighters in fighting fires. This design has been used by the United States without just compensation being paid the petitioners by the United States or any other source. They allege that this design was especially developed and is particularly adapted to protect fire fighters in fires involving aircraft. (Record Page 1.)

They further allege that the design is of great special value to the United States. They ask for an accounting and pray to recover the entire and reasonable compensation due them from the United States.

The Court of Claims has jurisdiction of the cause of action, recovery being allowed under the following laws and statutes:

> United States Constitution, Amendment 5: "Nor shall private property be taken for public use without just compensation";
>
> United States Code Annotated, Title 10, Section 310, sub-section (i): "Use of designs without just compensation; right to sue Government; limitation. Any person, firm, or corporation that shall complain that his, their, or its designs hereafter developed relating to aircraft or any components thereof are used or manufactured by or for any department of the Government without just compensation from either the Government or any other source, may within four years from the date of such use file suit in the Court of Claims for the recovery of his reasonable and entire compensation for such use and manufacture after July 2, 1926." (July 2, 1926, c. 721, Sec. 10, 44 Stat. 784, as amended Mar. 3, 1927, c. 345, 44 Stat. 1380; Aug. 7, 1946, c. 770, Sec. 1 (17, 33).

The United States filed its demurrer to the petition. In support of its demurrer it contended that the phrase in the statutes, namely: "design relating to aircraft", meant "a design of an aircraft." The Court of Claims followed the view of the Government, basing its opinion on what it termed the "history" of the Air Corps Act of July 2, 1926, as set forth in the appendix to the Government's Brief. (R. Pages 14-25.)

The petitioners contend that the words "relating to" should be given their ordinary sense; that inasmuch as their design is especially made and used for aircraft in an essential phase of aircraft operation, their design should be considered one "relating to aircraft" and, therefore, comes within the provision of the section under discussion.

The petitioners further contend that the Court improperly considered excerpts of statements of various individuals before the Morrow Committee, a Presidential Committee (not a Congressional Committee, not a Congressional Report, not debates in Congress), but isolated statements made before this committee to arrive at its conclusion, and to further hold that the statute applied only to unpatentable designs. (Respondents Brief Page 15.)

The petitioners contend that if the statements of individuals before the Morrow Committee are in fact to be considered, the statements before the said committee sustain petitioners position; and that the "History" of the Air Corps Act as set out in the statements of individuals before the Morrow Committee, if to be used at all in the interpretation of the legislation, clearly support the contention of the petitioners.

The petitioners therefore urge the Honorable Court to grant their petition for a writ of certiorari because of the erroneous decision entered against them by the Court of Claims.

Specifications of Assigned Errors

I

Did the Court of Claims err in considering in the construction of the Section 10 (i), excerpts from statements made by various individuals before the President's Aircraft Board, popularly known as the Morrow Committee, set forth in the appendix, pages 14 through 25 of the brief of the United States supporting its demurrer?

II

Did the Court of Claims err in excluding the plaintiffs from relief under Section 10 (i) in deciding that "designs relating to aircraft" means "designs of an aircraft"?

ARGUMENT

1. The Petitioners submit that the "History" as shown in the record is not properly to be considered.

The "History" of the legislation as set forth in the defendant's brief consists merely of statements made by certain individuals appearing before a Presidential Committee. The quoted excerpts do not purport to be and are not a committee report or excerpts from a debate in Congress. They are not comprised of statements made by those having charge of the legislation. Random statements are taken out of testimony before that committee to substantiate the Government's contention, which was adopted by the Court of Claims. To have based a decision on extrinsic matters of this type is clearly error, and is not in accord with the decisions of this Court. These statements are without weight in interpreting this Statute:

McCaughn v. *Hershey Chocolate Company,* 283 U. S. 488; 75 L. Ed. 1183;

Lapina v. *United States,* 232 U. S. 78; 58 L. Ed. 515.

Even if there might be some semblance of "History" in the statements of these individuals, the Court of Claims has infringed another rule of this Court in limiting the phrase under discussion. This Court has held that legislative "History" may not be used to support a construction that adds to or takes from the significance of the words employed.

U. S. v. *Miss. Pac. Ry. Co.,* 278 U. S. 269 at page 278; 73 L. Ed. 322.

The petitioners quote portions of the testimony to show that actually the testimony before the committee sustains the position of the plaintiffs-petitioners.

The evidence before the Morrow Committee shows that the witnesses had in mind the passage of a broad remedial

statute to protect the rights of all persons contributing to the advancement of aviation, and to implement by legislation the principle agreed upon by the Aviation Industry and by the Government that proprietary design rights should be recognized, sustained and applied to *all* aeronautical material. We call attention to the evidence favorable to the plaintiffs for the reason that the Government went into the evidence before that committee and has made the point that the statute under consideration was intended to protect only unpatented designs and only aircraft designs, contending that the phrase "designs relating to aircraft" does not mean what it says, but should be interpreted as "aircraft designs". When we review all the evidence, we find the testimony actually sustaining the plaintiffs' position. This evidence throws an entirely different light on the main intent of the witnesses. We, therefore, argue that the evidence shows the conclusion reached in the Government brief and by the Court of Claims to be patently incorrect. In fact, the evidence is overwhelmingly in favor of the principles urged by the plaintiff.

The evidence of Mr. Charles L. Lawrance, President of the Wright Aeronautical Corporation, quoted on page 1412 of the hearings sets forth certain principles upon which the aviation industry and the Departments of War and the Navy had agreed to. We quote as follows:

> "Pursuant to resolution, conferences were held between the representatives of the War and Navy Departments and the Industry. Out of these conferences an agreement was reached with the Army and Navy Air Services, which was finally approved and indorsed by the Acting Secretary of War and the Acting Secretary of the Navy, and the industry as the accepted policy to control the Government and industry in the procurement of aeronautical equipment as follows:
>
> 1. The Government shall encourage and promote the design and manufacture, by other than Govern-

ment agencies, of aircraft, aircraft engines and equipment.

2. The Government shall recognize and sustain the principle of proprietary design rights applied to all aeronautical material."

Throughout Mr. Lawrance's testimony he refers to "design rights for aircraft, aircraft engines or accessories." Therefore, we say that if the statute is construed in the light of this agreed policy, the phrase "designs relating to aircraft" refers to the plaintiffs' design. When we read the entire evidence of Mr. Chester W. Cuthell in the Hearings, we find that the burden of his testimony was directed not for a remedial statute to protect unpatentable designs but for something entirely different—in fact, he wanted to give *inventors* compensation without having to resort to the Court of Claims (Hearings p. 1433). He stated there were 220 cross-licensed patents on aircraft designs (Hearings, page 1433). His main contention was not the fact that aircraft designs were unpatentable, but that the protection given by the patent statute was an illusion, inasmuch as there was no proper remedy against infringers of patents who were constructing planes for the Government. Mr. Cuthell said at page 1427 of the Hearings as follows:

"Now the courts have held that the use of the word 'entire' in there" (*i.e.* in the patent statute) "destroys the patentee's right of action against a private manufacturer. Therefore, if I get a patent on a design or on any feature of an airplane, anyone of my competitors can come in and use it with perfect impunity so long as he is contracting for the United States, and that is where most of the business is. My only remedy is to sue in the Court of Claims. There is a destruction of the right of action against the infringing manufacturer. Of course, the constitutionality of that is yet to

be determined by the Supreme Court of the United States, but that is the present situation.

• • • • • • •

I have had the records of the Court of Claims searched and not one single dollar has been paid under the provision of that statute to any inventor.

Therefore, the thought that you have protection in your rights through a patent on an invention on an airplane is entirely an illusion."

Mr. Cuthell criticized the patent statute at page 1433 and stated that it is a bad statute for the reasons, first, that it destroys the rights of the patentees in their action against private infringers, second, that it does not give the patentee the same remedy for an infringement in a suit against the Government as the law gives against a private infringer, and in the third place, it is a bad law for the reason that the United States is given the right in the statute of availing itself of all defenses.

We, therefore, make the point that if the statute involved in this action is construed in the light of Mr. Cuthell's testimony, the construction urged by the petitioners, is sustained and is, therefore, in line with what Mr. Cuthell wanted, namely, that this is a new broad remedial statute protecting the proprietary rights of designs of all aeronautical material. Mr. Cuthell primarily wanted a simple remedy to protect inventors from unauthorized use. It was not to procure a statute to protect unpatentable designs. The following excerpt is from his testimony and is indicated by asterisks in the Government Brief:

"But the major difficulty lies in the fact that even if a patent on a design were obtained, compensation for unauthorized use would be deferred" during lengthy litigation, "and compensation for authorized future use under contract with the department would

be too small to encourage investment in an engineering and designing force capable of producing a new design."

The plaintiffs contend further that if this Morrow Committee testimony was before the Congressional Committee reporting Section 10 (i), of which there is no evidence, then the Committee had before it evidence from witnesses who had in mind a simple remedy to protect unpatented and patented designs, not only of aircraft, but "designs relating to aircraft" which, in the mind of the Committee, included aeronautical accessories, material, and equipment.

Thus we find in a letter from Honorable Curtis D. Wilbur, Secretary of the Navy, at page 1738 of the Hearings the phrase "Devices Affecting Aviation." In fact, certain portions quoted by the Government in its brief sustains this broad interpretation, for example, the phrase "the design and development of air service equipment" is used. In a portion of his letter not quoted by the Government at page 1730 of the Hearings he uses the phrase "aircraft and aircraft accessories" and in addition, and this is most important, he recommends a change in the patent law in order to help the little man (Hearings page 1731).

So in view of all the discussions before the Committee we say that the phrase "designs relating to aircraft or components thereof" is a coverall phrase to include the various phrases used and discussed in the Hearings.

2. The Court of Claims erred in failing to give a broad definition to the term "Relating To" That Ordinary Usage Implies and Public Policy Justifies.

We find no decisions of this Court defining the phrase "relating to." It is not a technical phrase. It is in common usage. The petitioners contend in view of the decisions

of this Court, that its ordinary meaning should be applied in construing this statute.

By way of illustration and not by way of precedent we respectfully show the court that the phrase has been construed as synonomous with "involving" (*Fehringer* v. *Martin*, 126 Pac. 1131 at p. 1133 (Colo.); "pertaining to," In re: *Water Supply in New York*, 109 N. Y. S. 652, or "connected with," *Nowland Realty Co.* v. *Com. Internal Rev.*, (C. C. A.) 47 F(2) 1018.

In addition, let us see what "relates to aircraft" as considered by the industry:

"The Aircraft Year Book" for the year 1946, published by the "trade"; being in the Library of Congress under order No. 2156-X, sets out numerous items that "relate to aircraft." In this book is described, among other designs, radar, weighing jacks, automatic pilots, fire detection devises, life rafts, parachutes, designs for lights at airports. In the trade directory in this Year Book, life saving equipment firms are listed, and in the 1947 Year Book firms selling fire fighting equipment are listed. Thus these safety devices are considered by the industry as "relating to aircraft," Therefore petitioners contend their design (a safety device) "relates to aircraft" within the ordinary meaning of the term, and is within meaning of the Statute.

Further, petitioners' design "relates to aircraft" for the reasons that (1) the design was intended for, manufactured and used in connection with aircraft and is (2) especially designed for and particularly adaptable to be used in connection with aircraft (R. 1).

To explain to the Court in part what the evidence in this regard is to be, we argue that a fire at a crash landing or take-off of aircraft (1) develops to a great volume immediately, (2) is limited in area, (3) creates a terrific heat,

and (4) the possibility of debris being thrown out by internal explosion is exceedingly great. (5) The fire is out of doors. There is no other type of fire which has all five of these characteristics present. In fighting such a fire the design of the plaintiffs is particularly adapted because: (1) It enables the fire fighter to get close to the burning aircraft. (2) It enables the fire fighter quickly to get to the seat of the fire. (3) The plexiglass visor protects the fireman from debris being thrown out from explosives while so close. (4) Since the fire is out of doors, the cool air rushing into the fire from the rear of the fireman supplies a current of air between the face and the visor which makes for more efficient work on the part of the fireman. It is, therefore, superior to the conventional asbestos hood. In fact the article is primarily adapted for use in connection with aircraft crash fires, and it has been necessary for the Petitioners to make modifications of their design to adapt it to general use, and they are applying for patents on "improvements" which have been necessary to sell it to the general trade.

The fact that it is a safety device gives it all the more relation to aircraft, for if there is any field where public policy demands the development of safety devices it is within the field of aviation. The public is appalled at the terrific toll of human life taken by fire in aircraft take-off and landing crashes. If this device allows the fire fighter a closer station at the fire, or a rescuer an access to a maimed and screaming occupant, how can it be said that it does not "relate to aircraft". It clearly relates to and involves a very vital and necessary operation and constitutes a safety device used in an emergency pertaining only to aircraft.

The Government contends that the statute was enacted because "designs of aircraft" are unpatentable. This contention is clearly erroneous. For example, there are numerous adjudicated cases involving patented designs of

aircraft. We cite them merely by way of illustration as follows:

Re Powelson (1931, Ct. Cust. and Pat. App.), 49 F. (2) 832;

Perkins v. *Lawrence Sperry Aircraft Co.* (1932, D. C. E. D. N. Y.), 57 F. (2d) 719;

Irving Air Chute Co. v. *Russell Parachute Co.* (1931, C. C. A. 3rd), 47 F. (2d) 130;

Carns v. *Callison* (1931, Ct. Custom & Pat. App.), 53 F. (2d) 546;

Van Meter v. *U. S.* (C. C. A. 2d), 47 F. (2d) 192;

Floyd Smith Aerial Equipment Co. v. *Irving Air Chute Co.*, 276 Fed. 834;

Wright Co. v. *Herring Curtiss Co.*, 204 Fed. 597;

Wright Co. v. *Paulham*, 177 Fed. 261;

Curtiss, etc., Co. v. *Janin*, 267 Fed. 198.

The contention of the defendant that the design is not within the statute because the remedy of the statute is for only unpatentable designs is further untenable for four valid reasons.

In the first place, the statute does not by its express words exclude patented designs. In the second, the remedy is afforded to "any person", whereas the relief against infringement of patent by the defendant excludes a large group of the people, *i. e.* employees of the defendant (U. S. C. A. Title 35, Section 68). The failure of Congress to exclude employees of the defendant from relief in the section under discussion was expressly the result of Congress' desire to promote and encourage the development of aviation among all the people. In the third place, there are many component parts of aircraft which are patentable and have been so patented. In the fourth place, those defenses available to the United States under the patent statute are not available here, so that we have a new remedy, a new conception of protection for property rights con-

ceived to include patented articles as well as unpatented with the rights to proceed under the Statute given "any person", and without the right of the United States to plead those defenses ordinarily given defendants in patent actions. All granted by the Congress to protect the rights of all citizens as against the defendant and to encourage the development of aviation.

It is, therefore, respectfully contended that the Court of Claims erred in failing to give to the term "relating to" its ordinary meaning, contrary to the decisions of this Court.

United States v. *Coombs*, 37 U. S. 72, 9 L. Ed. 1004;
De Ganay v. *Lederer*, 250 U. S. 376, 63 L. Ed. 1042;
Old Colony Ry. Co. v. *C. I. R.*, 284 U. S. 552, 76 L. Ed. 484;
U. S. v. *Temple*, 105 U. S. 97, 26 L. Ed. 967;
Addison v. *Holly Hill Fruit Products*, 322 U. S. 607, 88 L. Ed. 1488.

The Court below failed to give a meaning which would encourage by way of protection those persons originating designs essential to aircraft operation. This violates the purpose of the Act as expressed in its title as follows:

> "CHAP. 721—An act to provide more effectively for the National Defense by increasing the efficiency of the Air Corps of the Army of the United States, and for other purposes."
>
> (*Air Corps Act* of July 2, 1926, C. 721, Sec. 10, 44 Stat. 784.)

Such an erroneous interpretation is against public policy.

Conclusion

It is respectfully submitted that the petitioners are entitled to relief; that their design is one within the provisions of Section 10(i), and that the defendant's demurrer should be overruled.

The statute involved gives a general remedy. The design of the petitioners relates to aircraft and comes within its scope.

It would be unsafe practice to construe Section 10(i) in accordance with the contentions of the defendant.

It is earnestly prayed that the writ of certiorari be granted.

Respectfully submitted,

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